

FREEDOM OF INFORMATION ACT

Objectives of the Statute and Rules

- **Ensure an Informed Citizenry**
- **Guard against Corruption**
- **Hold the Decision Makers Accountable**

The Law

Virtually every “record” possessed by a Federal Agency must be made available in one form or another to any “person” who asks for it

APPLICABILITY

Applies to All of the Executive Branch

- **Not to Congress or its Committees**
- **Not to the Courts**
- **Not to States, Cities, Private Citizens**

Applies to Every Federal Agency “Record”

- **Anything in Written or Electronic Form**
- **Letters, Memos, Tables, Charts, Graphs**

Two-Part Test for what is an Agency “Record”

- (1) **Either Created or Obtained by an Agency**
- (2) **Under Agency’s “Control”**

Differentiate Agency from Personal “Records”

GROUND RULES FOR FILING FOIA REQUESTS

Any “Person” can file a FOIA request for records

- **US Citizens and Foreign Nationals**
- **Partnerships, Corporations, Associations**
- **Nations, States, Counties, Municipalities**

**Anyone can file a FOIA request for Any Reason
Whatever – motive is irrelevant**

**Any Member of Congress has the same rights
under FOIA as anyone else – but Congress and its
Committees cannot be denied access to Records**

**A FOIA requester’s Rights of Access or neither
increased nor decreased by having a particular
interest in the Records (*e.g.*, newspaper reporters)**

A FOIA request must be “Reasonably Defined”

- **Agencies don’t have to countenance fishing
expeditions or continuous requests**
- **Scopes of Requests can be Negotiated**

TWO THINGS FOIA DOES NOT REQUIRE

FOIA doesn’t require Agencies to *Create* Records

**FOIA doesn’t require Agencies to *Answer*
Questions or *Explain* Decisions**

GROUND RULES FOR RESPONDING

An Agency must conduct a Reasonable Search for all Records that fall within the Scope of a FOIA Request – but a “reasonable” search does not mean an exhaustive search

An Agency must respond to a FOIA request within 20 Working Days

- **Failure to respond is grounds for litigation**
- **Initial response might be a partial response**
- **A request for Voluminous Material might be more easily handled by an Opportunity for Inspection rather than copies of all documents within the Scope of the Request**

A Claim of “Public Interest” may be grounds for Waiver of Fees but not expedited treatment

Vaughn Index: An Agency must provide a requestor with a detailed index of records withheld and the reasons for withholding them

Plaintiffs’ Lawyers sometimes use FOIA as a supplement to Discovery in civil litigation – we cannot prevent that, thus, our litigators have to work in concert with our FOIA staff

NINE DISCRETIONARY EXEMPTIONS
5 U.S.C. § 552(b)

- One: National Security**
Two: Internal Rules and Practices of an Agency
Three: Nondisclosure Mandated by Other Statute
Four: Trade Secrets + Commercial or Financial Information Privileged or Confidential
Five: Evidentiary Privileges in Civil Litigation
- **Deliberative Process**
 - **Attorney Work Product**
 - **Attorney-Client Communications**
- Six: Personal Privacy (Personnel + Medical)**
Seven: Law Enforcement
Eight: Regulation of Financial Institutions
Nine: Geological + Geophysical Data on Wells

DELIBERATIVE PROCESS: THREE PURPOSES

- 1) Encourage Frank, Open Discussions amongst Staff and between Staff and Agency Leadership**
- 2) Protect Against Premature Disclosure of Policy or Decisions before Adoption or Transaction**
- 3) Protect Against Public Confusion about the Basis for a Decision**

All Exemptions are Discretionary, not Mandatory

**WE MUST SEGRAGATE THE MATERIAL
WE CHOOSE TO WITHHOLD
FROM THE MATERIAL THAT
MUST BE RELEASED**

Any “Reasonably Segregable” portion of a Record must be released if we invoke one of the Nine Exemptions to withhold other portions of that same Record

We have to make a paragraph-by-paragraph, line-by-line determination of what must be released versus what can be withheld

PROCEDURE

**USDOT Rule on Public Availability of Information:
49 CFR Part 7**

- **Initial Determinations**
- **Appeals from Initial Determinations**
- **Time Limits**

- **All Decisions to Withhold Records from Disclosure by Invoking an Exemption must be supported by Explicit Justification**

- **Fees**

Litigation in US District Courts

PMOC and FMOC REPORTS

**Consulting Contractors (PMOCs and FMOCs) are
USDOT Employees for Purposes of FOIA**

**Frequent FOIA Requests by Contractors Suing
Grantees or One Another seeking Data + Dirt on
Disputed Claims, Construction Delays, Cash Flow
Difficulties, Buy America compliance, so forth**

***Last Thing I want to do is create a Chilling Effect
on the Candid Observations, Advice and
Recommendations by PMOCs***

**Thus we make paragraph-by-paragraph,
line-by-line segregations for PMOC and FMOC
reports just as we do for any other Records**

New: Disclaimer in PMOC Reports

DRAFT NEPA DOCUMENTS

**It is not a Best Practice to claim a blanket (b)(5)
Deliberative Process exemption for draft chapters
and evolving material in NEPA documents**

**It is a convenience, however – and several Federal
agencies routinely get away with it**